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Supreme Court of the United States

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY and JOSEPH M. MESNIG, as Commissioners Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors of the Last Will and Testament of Eugene V. R. Thayer, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI. BRIEF AND ARGUMENT IN OPPOSITION THERETO.

HARRISON TWEED,
Attorney for Respondents.

WILLARD A. MITCHELL,
THOMAS A. RYAN,
DANIEL G. TENNEY, JR.,
of Counsel.

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The Question Presented.

Although the petitioners have so phrased their petition as to make it appear that they are presenting a single question under the Federal Constitution, they have in fact asked that this Court consider two such questions, only the first of which is justified by the record.

The "question presented" by the petition comprises the following two distinct questions:

A. Whether the Fourteenth Amendment (as already decided by this Court unequivocally in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567) prohibits a State from imposing an Estate Tax with respect to intangible personal property passing under

the testamentary exercise by a resident decedent of a general testamentary power of appointment, where the power had been created by the Will of a non-resident.

B. Whether, if the Fourteenth Amendment otherwise prohibits a State from imposing the tax, it also prohibits such taxation when the appointive property has a taxable *situs* within the taxing State. This question is not justified by the record (Point Two, *infra*).

Statement of Facts.

The petition fails to make clear the fact that the power exercised by the decedent was not a general power of appointment, but a general *testamentary* power of appointment (R. 104-105). The distinction is of the utmost significance.

The petitioners' statement of facts is otherwise substantially correct. The essential facts are these:

The decedent, a New York resident, exercised a general testamentary power of appointment created by the Will of his father, a Massachusetts resident. He was one of three trustees of his father's residuary estate and was a life beneficiary of and had a testamentary power of appointment over a one-third share of the trust. At his death there was physically present in New York certain intangible property belonging to the trust estate, but it has never been established that this particular property was the property over which his power of appointment operated (R. 53-57).

The New York Courts have unanimously ruled in this case that New York is without power to tax the property as part of the decedent's estate. The Court of Appeals in a *per curiam* opinion stated that a question under the Federal Constitution was presented and necessarily passed upon, but did not state specifically what the Federal question was, beyond stating that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is repugnant to the Fourteenth Amendment.

Summary of Argument.

I. The question presented herein was decided in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 (1926). That decision has never been expressly or impliedly overruled.

II. The question of the effect of the presence in New York of certain securities which may have been the subject of the power of appointment is not properly before this Court.

III. For this Court to consider the case at hand will serve no public interest.

POINT ONE

This question has been definitely decided by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 and that decision has never been expressly or impliedly overruled.

The question decided herein by the New York Court of Appeals has been directly decided by this Court, and the decision of the Court of Appeals in no way conflicts with any decision of this Court.

Wachovia Bank & Trust Co. vs. *Doughton*, 272 U. S. 567 (1926) is directly in point. A North Carolina resident (Mrs. Taylor) exercised a testamentary power of appointment created by the Will of a Massachusetts resident. In holding that North Carolina could not tax the property passing under the power, this Court said (p. 575):

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things

wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania*, 268 U. S. 473."

Mr. Justice HOLMES wrote a separate opinion based upon a misconception of a very significant legal principle. This opinion was not a dissent. It simply outlined the case of *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916), which had held that the State of domicile of the settlor of a trust who reserved the power of revocation and a general power of appointment *by deed as well as by will*, might tax the property as part of his estate. Mr. Justice HOLMES stated that, in his mind, the power of appointment in the *Wachovia Bank* case was as much a source of wealth to the donee as the power of appointment was to Bullen. He based this view upon his incorrect belief that "Mrs. Taylor, the donee, had * * * the power to dispose of the remainder by a will which she could bind herself to make." He then said that he could not help doubting that the *Wachovia Bank* decision could be reconciled with the *Bullen* case. This was not designated a dissent; it simply stated that Mr. Justice BRANDEIS and Mr. Justice STONE concurred "in this view." The basis of that view was the mistaken belief that the power could be validly contracted away and thereby operate as a source of wealth to the donee.

It is well established, however, both in New York and in Massachusetts, that a contract to exercise a *testamentary* power of appointment in a particular way is invalid. *Farmers' Loan & Trust Co.* vs. *Mortimer*, 219 N. Y. 290 (1916); *Vinton* vs. *Pratt*, 228 Mass. 468, 117 N. E. 919 (1917); Gray, The Rule Against Perpetuities (Third Edition), § 526c.

The power in the *Bullen* case was a general power of appointment *by deed or by will*. Even where given by a third person, such a power of appointment is in many respects the equivalent of ownership. Gray, The Rule Against Perpetuities (Third Edition), § 524. It is essentially no different from a power of revocation retained by a donor of property. In the case of a mere *testamentary*

power of appointment given by a third person, however, the donee of the power has no interest in the principal of the property greater than that of any life beneficiary. In the words of Mr. Justice CARDOZO in *Farmers' Loan & Trust Co.* vs. *Mortimer, supra*, at page 295:

> "the subject-matter of the power is not the property of the promisor. It is the property of his mother. The promisor was not the owner of any legal estate. He was the beneficiary of a trust. In such circumstances a power of appointment does not involve that absolute power of disposition which is equivalent to a fee (*Farmers' L. & T. Co.* v. *Kip*, 192 N. Y. 266). Those who take under this power have received nothing that was the property of John Mortimer [the donee]."

See also *Helvering* vs. *Safe Deposit & Trust Co.*, 121 F. (2d) 307 (C. C. A. 4th Circ., 1941); *United States* vs. *Field*, 255 U. S. 257 (1921).

In the *Bullen* case, moreover, the donor and donee of the power were one and the same. The transfer reserving the power was therefore not complete *from him* until his death and could be taxed as a transfer by him *of his own property* which did not take effect until his death.

Accordingly, it is clear that the separate opinion in the *Wachovia Bank* case was not thoroughly considered, as indicated by the fact that it was not labelled as a dissenting opinion.

The *Wachovia Bank* case has never been expressly overruled. It has been consistently recognized as an established precedent.* It was recognized as such as recently as by MR. JUSTICE STONE in *Curry* vs. *McCanless* (307 U. S. 357, at page 371).

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* *E. g., Brooke* vs. *City of Norfolk*, 277 U. S. 27, 29 (1928); *Safe Deposit & Trust Co.* vs. *Virginia*, 280 U. S. 83, 93 (1929); *Matter of Sandford*, 277 N. Y. 323, 329 (1938); *McMurtry* vs. *State*, 111 Conn. 594, 601, 151 Atl. 252, 256 (1930); *Commonwealth* vs. *Huntington*, 148 Va. 97, 121; 138 S. E. 650, 658 (1927); *Helvering* vs. *Safe Deposit & Trust Co.*, 121 F. (2d) 307, 309 (C. C. A. 4th Circ., 1941).

It is the assertion of the petitioner, however, that the recent decisions in *Curry* vs. *McCanless* and *Graves* vs. *Elliott*, 307 U. S. 383 (1939) are inconsistent with the *Wachovia Bank* decision and that the latter has been virtually overruled. Support for the petitioner's argument is to be found only in casual references in certain Law Review articles. The only serious consideration of the argument has been given by the Courts of New York in the case at hand. They have unanimously held that the *Wachovia Bank* case has not been overruled.

It cannot be said that their decision is "probably not in accord with applicable decisions of this Court" within the meaning of Rule 38, subdivision 5(a), of this Court. It in no way conflicts with the decisions of this Court for the following reasons:

Curry vs. McCanless, 307 U. S. 357 (1939).

In the *Curry* case a Tennessee resident deliberately created in Alabama a trust of her own intangible property, reserving the income for life and the power to appoint the property by will. This was a transfer to take effect at death. It was her own property and she did not make a completed gift of it. Cf. *Rasquin* vs. *Humphreys*, 308 U. S. 54 (1939). There were a number of reasons why Tennessee could tax this property, none of which exist in the case at hand:

(1) The transfer was *from* a Tennessee resident of *her own* intangible property which was not completed except at and by reason of her death. *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916); *Keeney* vs. *New York*, 222 U. S. 525 (1912); *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509 (1933).

(2) The decedent, being donor and donee of the power, could contract to exercise it and could thereby realize upon the principal which she had placed in trust. See *Citizens National Bank* vs. *Watkins*, 126 Tenn. 453, 150 S. W. 96 (1912); *J. S. Menken Co.* vs. *Brinkley*, 94 Tenn. 721, 31 S. W. 92 (1895). The contrary is true of a testamentary power of appointment created by a third person. *Farmers' Loan and Trust*.

Company vs. *Mortimer, supra* (219 N. Y. 290); *Vinton* vs. *Pratt, supra* (228 Mass. 468, 117 N. E. 919); Gray, The Rule Against Perpetuities (Third Edition), Section 526-c.

(3) In the *Curry* case, the decedent voluntarily subjected the transfer of *her own property* to the laws of two states.

Graves vs. Elliott, 307 U. S. 383 (1939).

In the *Graves* case, a Colorado resident created a trust in Colorado, reserving the power to revoke and to change the beneficiaries. She subsequently died a resident of New York without having relinquished her power of revocation. Obviously, the transfer was incomplete from her until her death. The power of revocation was also a source of wealth to the settlor. She could at any time have exercised it and realized thereby upon the principal of the fund; therefore her domicile could tax the property. *Keeney* vs. *New York, supra* (222 U. S. 525); *Bullen* vs. *Wisconsin, supra* (240 U. S. 625).

The Case at Hand.

In the case at hand, a Massachusetts resident by will created a trust in Massachusetts with three Massachusetts residents as trustees. He gave the decedent herein only the right to income for life (which the State of his domicile could tax during his lifetime) and the power of appointment by will (which the State whose laws controlled its exercise — Massachusetts — could tax). The trust was given its situs in Massachusetts. The decedent's father did not, as he might have done, create a trust with a New York trust company as trustee and thereby subject his property to the laws of two states. He made Massachusetts law alone applicable to the completion of the transfer. The property was subject to the control of the Massachusetts Court and remained so until the transfer from the Massachusetts trustees was completed by the exercise of the power. *Matter of Sandford*, 277 N. Y. 323, 328

(1938). The property passed at the death of the decedent herein from a Massachusetts resident through Massachusetts trustees to an appointee whose title depended upon Massachusetts law. The transfer was *by* the decedent but in no sense *from* him. He gave up nothing that was ever his. He had no estate in the principal of the trust. He had a single power with respect to it, to appoint it by will. Only if New York conferred the privilege of exercising the power would it have any justification to tax. Unlike the case of the owner of property, however, the transfer by Thayer was subject not to the law of his domicile but to the law of Massachusetts. *Blount* vs. *Walker*, 134 U. S. 607 (1890); *Sewall* vs. *Wilmer*, 132 Mass. 131 (1882); *Hogarth-Swann* vs. *Weed*, 274 Mass. 125, 174 N. E. 314 (1931); *Matter of New York Life Insurance & Trust Co.*, 209 N. Y. 585 (1913).

Not only has the *Wachovia Bank* case never been overruled, directly or indirectly, but the *Curry* and *Graves* cases established no principle of law not firmly established before the *Wachovia Bank* case was decided, viz.:

(a) The right of the State of domicile of the donee of a power of appointment created by himself had been established in *Bullen* vs. *Wisconsin*, a unanimous decision,

(b) The right of the State of domicile of the settlor of a trust who reserved the right to revoke had been established in *Keeney* vs. *New York*, also a unanimous decision.

(c) Where the donor and the donee were different persons but were domiciled in the same State, the State could tax the exercise of the power, on the theory that the State controlled and conferred the privilege of executing a will in the form necessary to exercise the power effectively. *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907), *Orr* vs. *Gilman*, 183 U. S. 278 (1902). These cases were distinguished in the *Wachovia Bank* case, and the distinction appears to have been recognized as controlling by the entire Court. No mention

of these cases was made in the separate opinion of Mr. Justice Holmes therein.

Aside from the decisions in *Curry* vs. *McCanless* and *Graves* vs. *Elliott*, the State Tax Commission cites *Pearson* vs. *McGraw*, 308 U. S. 313 (1939) and *Van Dyke et al.* vs. *Wisconsin Tax Commission et al.*, 311 U. S. 605 (1940). Neither of these cases is of any significance in this matter. They simply uphold the well-established right of a State of domicile to tax the *owner* of intangible property (or an owner who has relinquished certain rights to his own property and retained others or has made a transfer in contemplation of death) from levying a tax on that property as part of the decedent's estate, or from levying a gift tax upon a resident's transfer of *his own property*.

There is, therefore, no conflict between the decision of the New York Courts herein and any decision of this Court.

POINT TWO

The question of the effect of the presence in New York of certain securities is not properly before this Court.

The only question before this Court is whether the fact that a donee of a general testamentary power of appointment is domiciled within a State gives that State the power to impose a tax upon the property transferred by his exercise of that power.

The petitioners seek by indirection to obtain consideration of the additional question of whether the fact that the appointive property was present in the State would give that State the power to impose a tax upon its transfer.

The latter question is not before this Court for a number of reasons:

(1) The Court of Appeals did not necessarily decide that the Federal Constitution prohibits a State from levying

an Estate Tax upon property having its situs within that State.

The petitioners, in the Surrogate's Court, the Appellate Division and the Court of Appeals, argued that the presence in New York of certain securities which they alleged were the appointive property differentiated this case from the *Wachovia Bank* case and justified the imposition of the tax by New York. The Executors argued in answer thereto (a) that the statute in question was not intended to tax securities by reason of their presence within the State, and in fact could not do so under the State Constitution; (b) that the presence of the appointive property in New York had not been established; and (c) that its presence in New York, even if proved, did not constitute a taxable situs under New York law. The New York Courts refused to lend any significance to the presence of certain securities in New York. Their decision in this respect could have been based, and almost unquestionably was based, upon any one or more of the above arguments of the Executors, namely:

(a) The State Constitution, Article XVI, Section 3, specifically waives the power of the State to tax intangible property on the basis of its presence or a trustee's domicile within the State. See Appendix A.

(b) Even if the appointive property was in New York, it did not have a tax situs in the State under New York law. A trust may have but one situs and the removal of a trustee, with or without the property, cannot affect its situs. *Matter of Sandford*, 277 N. Y. 323 (1938); 2 Beale, Conflict of Laws, section 297.1, page 1024; *Swetland* vs. *Swetland*, 105 N. J. Eq. 608, 149 Atl. 50, 52 (1930). Under New York law, the property had no recognizable situs in New York. Constitution of the State of New York, Article XVI, Section 3 (Appendix A hereto); *Matter of Sandford, supra.*

(c) The presence in New York of the appointive property had not been established. It has never been determined whether the decedent's power of appoint-

ment operated to pass title to the securities which he segregated or simply to one-third of the entire residuary trust. This question was raised in the Probate Court in Massachusetts, but was settled by compromise (R. 53-57).

(2) Moreover, the Court of Appeals not only did not have to decide but clearly did not decide that the Fourteenth Amendment prohibits a State in which property has its situs from imposing a tax upon its transfer. The Court had before it the unequivocal decisions of this Court to contrary effect in *Graves* vs. *Elliott*, 307 U. S. 383 (1939); *Curry* vs. *McCanless*, 307 U. S. 357 (1939); *Safe Deposit & Trust Co.* vs. *Virginia*, 280 U. S. 83 (1929). The Court had itself, in *Matter of Brown*, 274 N. Y. 10 (1937), upheld the right of Colorado, where a New York resident had established an *inter vivos* trust with a Colorado trust company, to tax the transfer of that property upon the settlor's death. The Court of Appeals nevertheless considered the presence of the securities to be of no significance herein and based its decision upon the *Wachovia Bank* case, in which the appointive property was definitely located outside of the taxing State. This is apparent from the indistinguishable case of *Matter of Sandford*, *supra* (277 N. Y. 323), the material part of which is quoted hereinafter as Appendix B, and which was decided after *Matter of Brown*. That the *Wachovia Bank* case was deemed to be controlling —and the location of the securities to be of no significance— is also apparent from the opinion of the Surrogate's Court herein (R. 192-202). The Appellate Division and Court of Appeals affirmed the Surrogate without opinion.

Under the circumstances, the only question, if any, which may properly be considered by this Court is whether a State, by reason of being the domicile of a donee of a testamentary power of appointment, may, under the Federal Constitution, include in the estate of the donee the property subject to the power if the power was created by the will of a resident of another State. The physical situs of the appointive property is of no significance.

POINT THREE

For this Court to consider this case will serve no public interest.

There is no reason why this Court should in its discretion grant the writ of certiorari sought herein:

A. There is no justifiable confusion as to the powers of the States to tax the transfer of property by general testamentary power of appointment:

(1) The State whose laws confer and control the right of exercising the power of appointment may tax the exercise thereof. *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907); *Orr* vs. *Gilman*, 183 U. S. 278 (1902); *Gardiner* vs. *Burrill*, 225 Mass. 355, 114 N. E. 617 (1916). See also *Wachovia Bank & Trust Co.* vs. *Doughton*, *supra*, at pages 573-575.

(2) The State of domicile of the donee of a general testamentary power of appointment created by a third person may not tax the appointive property unless its laws control or confer the right to exercise that power. *Wachovia Bank & Trust Co.* vs. *Doughton*, *supra*. Cf. *United States* vs. *Field*, *supra* (255 U. S. 257).

(3) The State of domicile of the donee may levy an estate tax upon the appointive property where the donor and donee are the same person (*i. e.*, transfer taking effect at death). *Bullen* vs. *Wisconsin*, *supra* (240 U. S. 625); *Curry* vs. *McCanless*, *supra*; see also *Guaranty Trust Co.* vs. *Blodgett*, *supra* (287 U. S. 509); *Keeney* vs. *New York*, *supra* (222 U. S. 525).

(4) The State of domicile of the donee of a general power of appointment *by deed or by will* may levy an estate tax upon the appointive property regardless of who created the power. *Bullen* vs. *Wisconsin*, *supra*.

The foregoing principles define clearly and completely the powers of the States to tax property passing under a power of appointment. There is no need for reconsideration or amplification of these principles.

B. Not only is there no confusion or uncertainty justifying further consideration of this case but there is no public interest to be served thereby.

(1) The established principles do not facilitate the evasion of taxation. The donee of a general testamentary power of appointment may be taxed for exercising that power by the State whose laws control its exercise. There is no reason why any other State should be entitled to levy a tax upon it. The donee's domiciliary State affords him no rights or privileges with respect to the appointive property.* The transfer of title upon his death (unlike that of an owner of property) depends not upon the laws of his domicile but solely upon the laws of the donor's domicile. The donee's domiciliary State can neither control nor prevent the effective exercise of the power.

(2) To alter the established principles would do great injustice.

The *owner* of intangible personal property may move himself and his property as he will from State to State and yet can be taxed upon his death only by the State of his domicile, unless he has voluntarily given the property a physical situs in another State, in which case the same property may be taxed by two States upon his death.

The donee of a general testamentary power of appointment has far fewer rights in the property than he would were he its owner. Yet to uphold the petitioners' claims would mean that the donee could very

* The right to receive the income may, of course, be taxed by the beneficiary's domiciliary State; this, however, does not justify a tax by the domiciliary State upon the principal of the trust. *Brooke* vs. *City of Norfolk, supra* (277 U. S. 27).

easily be taxed at death by as many as three States *without having it in his power to prevent any of the multiple taxation.* He could be taxed (a) by the State of the donor's residence, whose laws control the exercise of the power, (b) by the State of his own domicile and (c) by the State into which the trustee might choose to take the property.

Such manifest injustice reveals the fallacies in the petitioners' contentions.

C. It is submitted that the principles established by this Court and which are outlined above, constitute a reliable guide for the conduct of taxing authorities and persons desiring to create or exercise powers of appointment. There is no justifiable confusion in the law.

Conclusion.

The petition for a writ of certiorari to the Surrogate's Court of the County and State of New York should be denied.

Respectfully submitted,

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APPENDIX A.

Article 16, § 3 of the Constitution of the State of New York.

"Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

APPENDIX B.

Excerpt from the Opinion in *Matter of Sandford*, 277 N. Y., 323 (1938), pages 328-329.

"O'Brien, J. The testatrix, Lisa W. Sandford, who died February 7, 1934, was the daughter of Thomas B. Winchester, a resident of Massachusetts, whose will was probated in that Commonwealth in March, 1904. By his will Mr. Winchester established a trust in favor of this testatrix, among others, with power of appointment by her in her will of the beneficiary of the principal. By the seventh paragraph of Mrs. Sandford's will, executed June 30, 1932, and the codicil, executed September 1, 1933, she exercised this power in favor of ten individuals and one charitable institution.

"The first issue presented by appellant, State Tax Commission, is whether the value of the securities in the Winchester trust should be included in the gross estate of Lisa W. Sandford and whether the transfer, by the exercise of her power of appointment, is taxable in this State. The record discloses the fact that the original trustees of the testamentary Winchester trust were both residents of Massachusetts, and that after the death of one of them the other continued to act as sole surviving trustee until his death in January, 1933. During all that time the securities, comprising the *corpus* of the trust, were held by the trustees in Massachusetts. After the death of the surviving trustee the Probate Court of Suffolk county, Massachusetts, in April, 1933, appointed, as substitute trustees, two residents of New York, who are still acting. For twenty-nine years, until shortly after the appointment of the New York residents as trustees, *all* the securities comprising the trust were held in Massachusetts, but since April or May, 1933, the *greater part* have been held in New York. This testatrix died in February, 1934. The Winchester trust was created by a Massachusetts resident, the trustees are subject to the control of the Probate Court of that State, and all the securities constituting the *corpus* had an actual situs there except for one year prior to the death of the donee of the power and at present have at least a constructive situs there. The trustees' obligation is to account to the Massachusetts court. The actual presence in this State of the certificates or instruments evidencing the intangible property did not afford a basis for taxation. Neither did the removal of the residence of the trustee into this State afford a basis for the imposition of a tax. The transfer of the securities in the trust by the exercise of this power of appointment is not taxable in this State. (*Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567.)"